Employer Liability for 'Take-Home' COVID-19 Infections

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In all workers' compensation claims, the fundamental relationship is that between the employer and the employee. In that regard, workers' compensation has always been viewed as a compromise between the employer and the employee: The employee is limited to finite benefits but is alleviated from having to prove fault on the part of the employer. The workers' compensation claim is the employee's exclusive remedy. This is the case regardless of the injury, be it orthopedic or occupational.

However, the novel injury of COVID-19 infection may affect a worker's household, when the worker may infect a spouse or child, who may also become ill. Because the spouse or child would not be an employee covered by workers' compensation, employers may face liability in tort for so-called "take-home" COVID exposure. This article explores potential employer liability in this area.

Statutory liability shields

In response to the COVID-19 pandemic, numerous states passed liability shields that require potential plaintiffs to prove elevated levels of negligent conduct on the part of a business. For example, in states such as Alabama, Arkansas, Indiana, Louisiana, Montana, and Utah, businesses are immune from civil liability unless the business engaged in any acts that constitute gross negligence, wilful and wanton misconduct, or intentional wrongdoing.

Other states, such as Florida, Nevada, North Dakota, Texas, and Wyoming, shield businesses from tort liability where there is a good-faith effort to substantially comply with government-promulgated standards in regards to COVID-19. Interestingly, the Michigan statute expressly provides civil immunity to an "employer" (and not just a "business") for the employee's exposure to COVID-19, provided that the employer was operating in compliance with federal, state, and local rules, regulations, and orders related to COVID-19.

California's *See's Candies* case

Where the legislature declines to act in this area, businesses can expect to see take-home COVID-19 litigation emerge. For example, the State of California did not pass legislation shielding businesses within the state from liability for COVID-19 infection. That opened the door for a wrongful death claim of an employee who contracted COVID-19 while at work. The plaintiff-employee infected her husband with COVID-19, and her husband died from COVID-19. (*See's Candies, Inc. v. Superior Court*, 73 Cal. App. 5th 66 (2021)). The plaintiff-employee's theory of liability was that the defendant-employer failed to implement adequate safety measures and that employer-defendant's failure to do so was the cause of the decedent's death.

The defendant-employer filed a demurrer, arguing that plaintiff's claims were barred by the exclusive remedy provisions in the California state workers' compensation statute. The defendant-employer argued that the "derivative injury doctrine" applied. Because the decedent allegedly contracted COVID-19 from the plaintiff-employee, who in turn contracted the disease at work, defendant-employer argued that decedent's death would not have occurred absent plaintiff-employee's workplace exposure, and thus was derivative of the work injury.

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The California Court of Appeals rejected the defendant-employer's assertion of the "derivative injury doctrine," holding that third party injuries are not subject to the derivative injury doctrine merely because they are caused by an employee injury. Instead, the court analogized the decedent's death to California's *Kesner* line of cases, where the California Supreme Court held that an employer could be held liable for injuries to an employee's family members caused by asbestos fibers on the employee's clothing. (*Kesner v. Superior Court*, 1 Cal. 5th 1132 (2016)). The *See's Candies* court affirmed the denial of defendant-employer's demurrer.

Notably, the decision did not address whether the defendant-employer had a duty of care or whether the plaintiff-employee could demonstrate negligence — only whether workers' compensation exclusivity applied to the decedent.

Will take-home COVID-19 infections be analogized to asbestos?

If California is the road map to how states without COVID-19 liability shields are going to be litigated, then practitioners in these jurisdictions may have to look to how secondary asbestos exposures are handled state-by-state. California's *Kesner* case held that there is a duty by employers and premises owners to exercise ordinary care in their use of asbestos including preventing exposure to asbestos carried by the bodies and clothing of on-site workers.

For private employers in jurisdictions where there is no statute limiting civil liability for secondary, non-employee COVID-19 infections, the door is open for "take-home" COVID-19 civil claims.

That duty extends to members of a worker's household where it is reasonably foreseeable that the workers "will act as vectors carrying asbestos from the premises to household members." California in effect applies an ordinary negligence standard in imposing a duty of care on employers as to members of employees' households.

Other states are divided on the extent to which an employer may be liable to an employee's household members. The Delaware Supreme Court held that a household member who regularly launders an employee's asbestos-covered clothing may sue her spouse's employer for its failure to provide warnings and safe laundering instructions. (*Ramsey v. Ga. S. Univ. Advanced Dev. Ctr. & Hollingsworth & Vose Co.*, 185 A.3d 1255 (Del. 2018)).

The Louisiana Court of Appeals upheld a trial court's determination that an employer owed a duty of care to the wife of a shipyard employee for the wife's asbestos-related injuries. (*Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. Ct. App. 2006)).

Conversely, other jurisdictions have held that a duty of care does not exist where it is not foreseeable that a secondary household exposure would occur. For example, the U.S. 6th Circuit Court of Appeals held that under Kentucky law, there was no duty based on secondary exposure because defendant-employers could not have known of the risk of secondary exposure in the 1950s when the plaintiff's father worked with asbestos products. (*Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009)).

The Texas Court of Appeals similarly held that the defendant-employer did not owe a duty of care to the injured spouse of an employee because the danger of non-occupational exposure to asbestos dust on workers' clothing was neither known nor reasonably foreseeable to defendant in the 1950s. (*Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. Ct. App. 2007)).

Less common are the states that have statutes shielding premises owners from all secondary exposure liability. For example, Kansas and Ohio have statutes that expressly limit recovery to those who were actually physically present at the premises where silica/asbestos was also present.

Employer takeaways

For private employers in jurisdictions where there is no statute limiting civil liability for secondary, non-employee COVID-19 infections, the door is open for "take-home" COVID-19 civil claims. The California courts have analogized COVID-19 exposures to secondary asbestos exposure, which has a wealth of case law in nearly all jurisdictions.

If this is the prevailing trend, then employers must look to each jurisdiction where its businesses reach to assess potential liability and take proper precautions to shield themselves from liability in this area.

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